IN THE

# Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

HELMS BAKERIES, a corporation,

*Petitioner, and Appellee Below,*

*vs.*

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, R. E. COLLINS, GEORGE R. REILLY, HARRY B. RILEY, FRED E. STEWART and WILLIAM G. BONELLI, individually and as members of the State Board of Equalization of the State of California,

*Respondents and Appellants Below.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### Opinion of the Courts Below.

The opinion of the District Court of Appeal of the State of California, First Appellate District, Division 2, is found on pages 78-85 of the record as printed under the direction of the clerk of this Court. It is reported in 53 Advance Cal. App. Reps. 490, the Supreme Court of the State of California denied a hearing (one justice voting for a hearing) without any written opinion.

## II.

## Jurisdiction.

1. The date of the decision of the District Court of Appeal was July 15, 1942. Under Section 3 of Rule 30 of the Rules of the Supreme and District Courts of Appeal of the State of California, application for an order that a cause be heard and determined by the Supreme Court must be accompanied by a copy of the opinion of the District Court of Appeal and must be served and filed on the adverse party with proof of service within forty days after the date of the decision by the District Court of Appeal. This was done, application having been served and filed on the 23rd day of August, 1942. [Rec. p. 62.] The Supreme Court denied the hearing on September 10, 1942 [Rec. p. 86], four days prior to the time that jurisdiction to act expired. Petition is made to this Court prior to the expiration of the three-month period as provided for by Title 28, Subdivision 350, U. S. C. A., and Sec. 8 of Act of February 13, 1925.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28, Sec. 344, U. S. C. A. Subdivisions (a) and (b) (Jud. Code, Sec. 237, as amended by the Act of February 13, 1925; also Act of March 8, 1934, and Rules of Practice and Procedure, including particularly Rule 38 of the Supreme Court of the United States.)

3. The nature of the case and the rulings of the Court below were and are such as to bring the case within the jurisdictional provisions relied on, in that there is drawn into question the validity of a statute of the State of California on the ground of its being repugnant to the Constitution, and the decision of the trial court was in favor

of validity; also, this Court has jurisdiction in that the decision of the District Court of Appeal rendered pursuant to assignment by the highest court in the State of California and passed later on by the Supreme Court of the State of California (by refusing a hearing after judgment in the District Court of Appeal), is repugnant to the Constitution of the United States; also this Court has jurisdiction in that "title, right, privilege, or immunity is specially set up and claimed by the present petitoner under the constitution."

This case was for an injunction to prevent a threatened forfeiture of a retail sales tax permit issued under the California Retail Sales Tax Act (Cal. Statutes of 1933, p. 2599, as amended). [Rec. p. 9.] The complaint, answer and findings all show that plaintiff had a large investment, numerous employees, did business and required a retail sales tax permit, which was property. [Rec. pp. 1-9.] The Board admittedly planned, in May, 1940, to forfeit the Bakery's permit. [Rec. pp. 6-7.] The threat of cancellation was not qualified by any statement or offer that the permit would be returned or a new permit granted in the event the money was paid. The undisputed findings show that no tax was due or owing from the Bakery, and there had been an overpayment in excess of $21,000.00. The Board's only ground for the alleged forfeiture was that it claimed that a tax was owed for the period from October 1, 1934, to and including June 30, 1935, on food sold to routemen who resold it to the consumers at retail. There was no judgment to this effect. The California Retail Sales Tax Act provided (Sec. 30 thereof) for collection by suit. This remedy had a three-year period of limitations and no suit was brought thereon. The petitioner's suit for injunction against forfeiture of

the permit was filed in July, 1940, or five years after the alleged tax became delinquent. [Rec. p. 1.] The statute was amended in 1935, without any "saving" clause, eliminating all tax on edible foods sold at retail. This Act, as amended, stated:

> "Sec. 5. There are hereby specifically exempted from the provisions *of this act* and from the computation of the amount of tax levied, assessed or payable *under this act* the following:
>
> * * * * * * * * *
>
> (e) The gross receipts from the sale of good products for human consumption. 'Food products' as used herein includes cereals and cereal products, milk and milk products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and sale, sugar and sugar products other than candy and confectionery, coffee and coffee substitutes, tea, cocoa and cocoa products other than candy and confectionery."

The trial court found that no right to forfeiture of the permit existed and granted the injunction. [Rec. p 20-21.] The District Court of Appeal disregarded in its decision:

(a) That a provision of the same statute as permits forfeiture of the permit provides for a proceeding to collect the alleged tax and that by the 1933 Act it had to be brought in 2 years and by the 1935 Amendment it must be brought within three years of delinquency;

(b) The fact that no right to recover any taxes existed in view of the action of the Legislature in repealing the law without a "saving" clause;

(c) That the evidence shows that it was admitted by the State that the Bakery had a large and substantial in-

vestment on which many people depended for their livihood and for foodstuffs, and the margin was such that it could not continue to operate without a sales tax permit covering retail sales of non-edibles to ultimate consumers;

(d) That the Bakery would suffer great and irreparable injury; [Rec. p. 18.]

(e) That the Bakery owed no money to the Board. [Rec. p. 18.]

The District Court of Appeal without overthrowing any of the foregoing findings, except to state that in its opinion the great and irreparable injury was not proved (in so doing it invaded the provence of the trial court since there was substantiating evidence which was uncontested), assumed, without authority therefor

(a) That the forfeiture of the permit was a permitted proceedings for the collection of a non-adjudicated tax [Rec. pp. 78, 79, 81];

(b) That payment under protest and an action to recover back was an adequate remedy at law for the forfeiture of a permit, though such would not restore a permit [Rec. p. 79].

It neglected to consider that great and irreparable injury would occur in the meanwhile while such an action could be brought, adjudicated and recovery obtained (assuming that a permit in some way could be again obtained.) [Rec. p. 84.]

In the complaint it is pleaded and found to be true that there has been an overpayment by the Bakery to the State Board of Equalization of $27,963.46. This is set up in paragraph VII of the complaint [Rec. p. 4] and found to be true. [Rec. p. 16.] Therefore, assuming,

but not conceding that the $6,572.28 is due, this should be offset. In balancing one against the other, there is still an overpayment on the part of HELMS BAKERIES in excess of $21,000. No ground for any forfeiture exists therefor under the admitted facts of this case, and the opinion of the District Court of Appeal is based solely on (1) disregard of proven and admitted facts, and (2) the assumption of a state of facts which does not exist, and (3) an attempt to apply inapplicable authorities to such a fictitious and unapplicable state of facts.

The constitutional rights of the HELMS BAKERIES were raised by complaint, *i. e.*, paragraphs I, II, III, VII, VIII, IX, XI, XIII and XIV of the complaint. [Rec. pp. 1-9.] These allegations, in many respects, are not denied [Rec. 50-59], and are all found to be true after introduction of supported, competent or stipulated evidence with respect to those allegations that were denied. [Rec. pp. 50-59.] The decision of the District Court of Appeal recognizes that the constitutional question was raised and erroneously, without the full support of the cases mentioned as supporting its decision, brushes aside the federal question saying [Rec. p. 85] "respondent also suggests the point of appellants by their threatened action, are seeking to deprive respondent of a property right or privilege without due process of law. We consider the point would be untenable (see Sears, Roebuck & Co. v. Roddewig, 24 Fed. Supp. 321; and Morrison-Knudsen Co. v. State Board of Equalization, 35 Fed. Supp. 553.)"

4. The cases believed to sustain said jurisdiction are as follows:

*Ohio Valley etc., v. Bar Avon Borough,* 253 U. S. 287; 64 L. Ed. 908;

*Home Tel. & Tel. Co. v. City of Los Angeles,* 227 U. S. 278; 57 L. Ed. 510;

*Fid. & Dep. Co. of Md. v. Tafoya, Chn., State Corp. Com. of New Mexico, et al.,* 270 U. S. 426, 434-5; 70 L. Ed. 664, 667;

*Frisk v. Penn.,* 268 U. S. 473, 488-9; 69 L. Ed. 1058, 1062;

*Louisville, etc. Ry.,* 188 U. S. 385, 394-5; 47 L. Ed. 5B, 517-8;

*Raymond, Co. Treas. of Chicago v. Union Tr. Co.,* 207 U. S. 20, 35-6; 52 L. Ed. 78, 87;

*Morrison Knudson Co. Inc. v. State Bd. of Equalization of Wyoming,* 35 Fed. Supp. 553, 556;

*Morris v. Alabama,* 294 U. S. 587, 79 L. Ed. 1074;

*United States of America v. Clrsie,* 313 U. S. 299, 326; 85 L. Ed. 1368, 1383;

*Milkwagon Drivers Union v. Meadowmoor Dairies,* 312 U. S. 287, 85 L. Ed. 836;

*Nashville etc. v. Wallace, Treasurer,* 288 U. S. 249, 261-2; 77 L. Ed. 731, 735;

*Pierce v. Society of Jesus, etc.,* 268 U. S. 510, 69 L. Ed. 1070;

*Risty v. Great Northern,* 270 U. S. 378, 70 L. Ed. 641;

*Village of Euclid v. Ambler Realty Co.,* 272 U. S. 365, 71 L. 303;

*Terrace v. Thompson,* 263 U. S. 197, 68 L. Ed. 255;

*Laisne v. California State Board of Optometry,* 19 Cal. (2d) 831;

*Hurtado v. People of California,* 110 U. S. 510, 28 L. Ed. 232, 238-9;

*Nashville etc. Railway v. Wallens, Comptroller of the State of Tenn.,* 288 U. S. 249, 77 L. Ed. 730.

## III.

## Statement of the Case.

This has already been stated in the preceding petition which is hereby adopted and made a part of this brief.

## IV.

## Specification of Errors.

The District Court of Appeal of the State of California, First Appellate District, Division 2, erred in its decision wherein it held directly or indirectly;

1. That the Bakery owed the State of Calfornia a "reassessed tax imposed under the provisions of the Act." [Rec. p. 79.] The uncontroverted findings are to the contrary [Rec. pp. 17, 18];

2. That payment under protest and an action against the State Treasurer to recover the tax so paid is and was a remedy open to the Bakery; that the funds so paid could so be recovered and that this is the remedy to prevent the forfeiture or cancellation of a sales tax permit [Rec. p. 84];

3. That the cases cited in the opinion with reference to attempts to collect taxes imposed under unconstitutional statutes are applicable to an attempt to prevent cancellation of a sales tax permit for failure to pay an alleged tax where the statute has been amended to eliminate such a tax [Rec. pp. 84-85];

4. The forfeiture of a Sales Tax Permit is a constitutional method of collecting a Retail Sales Tax [Rec. p. 83].

5. That where there is evidence before the trial court of a great and irreparable injury, the District Court of Appeal may substitute its judgment for that of the trial

court, and that the failure of the appellant to offer evidence on the subject does not constitute a waiver [Rec. p. 85];

6. That even though the statute does not provide, under such circumstances, for the return of a sales tax permit, petitioner "would have been adequately compensated" if petitioner paid the tax under protest and then recovered it back with interest [Rec. p. 84];

7. The petitioner's contention that by the threatened forfeiture of the sales tax permit, the State Board of Equalization is attempting to "deprive respondent of a property right or privilege without due process of law is untenable." [Rec. p. 85.]

## V.

## ARGUMENT.

### Summary of the Argument.

POINT A. The Board of Equalization had no right to forfeit the retail sales tax permit belonging to HELMS BAKERIES and therefore invaded petitioner's constitutional rights in attempting so to do because:

1. The repeal of the retail sales tax on edible foodstuffs by amendment to the statute, which amendment did not include any "saving" clause, repealed the right to collect assuming (not admitting), that there was any retail sales tax due from petitioner at any time;

2. The Statute of Limitations both on collection and on forfeiture had run at the time of bringing of the action in the Superior Court, and the right to collect or forfeit having lapsed, no forfeiture for any alleged failure to pay any sales tax was permissible;

3. The correctness of the following pertinent findin of the Superior Court is not questioned by the decision the District Court of Appeal and to forfeit the perm under such facts is a violation of petitioner's constitution rights;

(a) "That said routemen in reselling such food produc were independent contractors and were not servants ar employees of plaintiff" [Rec. p. 16];

(b) That under the Sales Tax Act, the tax was an is only on retail sales, and that the sales of food by th Bakery to the routemen (who as independent contractor sold to the consumers at retail) were not sales at retail, bu sales at wholesale and not taxable [Rec. p. 17];

(c) That by amendment effective July 1, 1935, ther was specifically "exempted from the provisions of sai Act, and from the computation of the amounts levied assessed or payable under said Act, the gross receipt from the sale of food products for human consumption;

(d) That "on or about December 8, 1939, the de fendants herein, knowing they had no jurisdiction or au thority to levy any purported assessment, whereby saic defendants purported to reassess against plaintiff so-called sales tax on so-called retail sales of food products during the three-quarters beginning October 1, 1934 and ending June 30, 1935. That plaintiff has heretofore paid to the State Board of Equalization all sales and use taxes, in- terest and penalties" [Rec. pp. 5-6];

(e) That the said State Board of Equalization "is with- out any jurisdiction, power or authority to revoke or sus- pend any retail sales tax permit except for failure to com- ply with the provisions of said Retail Sales Tax Act, or the rules and regulations of said State Board of Equaliza-

tion, and that at no time since June 30, 1935, or at any other time, has this plaintiff failed to comply with any provision of the Retail Sales Tax Act, or any rules and regulations of the State Board of Equalization, prescribed or adopted under such Act" [Rec. p. 8];

(f) That the amount claimed is $6,572.28 and there has been an overpayment of $27,963.46. [Rec. p. 5.]

4. In the event the plaintiff's permit is revoked "plaintiff would not be entitled to any existing provisions of the law of the State of California to recover said sums of money, or any interest thereon. That by reason of each and all of the facts herein alleged, plaintiff has no plain, speedy or adequate remedy at law."

POINT B. Forfeiture of the permit would be improper because a method for collection of delinquent taxes is provided by the Statute and the specific provision governs the general provisions.

POINT C. The section concerning forfeiture of the permit does not give the Board of Equalization the right to determine the existence of an indebtedness and there has been no Court determination in this case, nor does the statute provide for review by the courts. The section is not constitutional and deprives the petitioner of property rights without due process of law and the Board proposes to assume judicial powers not granted to it by the statute.

POINT D. The threatened forfeiture of a permit is not a constitutional method of procedure to collect an alleged civil debt, and such a method of procedure legalizes government by force and threat, and is a violation of the petitioner's constitutional rights.

## POINT A.

The Board of Equalization Had No Right to Forfeit the Retail Sales Tax Permit Belonging to Helms Bakeries and Therefore Invaded Petitioner's Constitutional Rights in Attempting to So Do Because:

1. The repeal of the retail sales tax on edible foodstuffs by amendment of the statute, which amendment did not include any "saving" clause, repealed the right to collect, assuming (not admitting) that there was any retail sales tax due from petitioner at any time;

2. The statute of limitations both on collection and on forfeiture had run at the time of the bringing of the action in the Superior Court, and the right to collect or forfeit having lapsed, no forfeiture for an alleged failure to pay any sales tax was permissible;

3. The correctness of the following pertinent findings of the Superior Court is not questioned by the decision of the District Court of Appeal and to forfeit the permit under such facts is a violation of petitioner's constitutional rights:

(a) "That said routemen in reselling such food products were independent contractors and were not servants and employees of plaintiff" [Rec. p. 17];

(b) That under the Sales Tax Act, the tax was and is only on retail sales, and that the sales of food by the Bakery to the routemen (who as independent contractors sold to the consumers at retail) were not sales at retail, but sales at wholesale and not taxable [Rec. p. 16];

(c) That by amendment effective July 1, 1935, there was specifically "exempted from the provisions of said Act, and from the computation of the amounts levied, assessed or payable under said Act, the gross receipts from the sale of food products for human consumption";

(d) That "on or about December 8, 1939, the defendants herein, knowing they had no jurisdiction or authority to levy any purported assessment, whereby said defendants purported to reassess against plaintiff, so-called sales tax on so-called retail sales of food products during the three quarters beginning October 1, 1934, and ending June 30, 1935. That plaintiff has heretofore paid to the State Board of Equalization all sales and use taxes, interest and penalties" [Rec. pp. 5-6];

(e) That the said State Board of Equalization "is without power or authority to revoke or suspend any retail sales tax permit except for failure to comply with the provisions of said Retail Sales Tax Act, or the rules and regulations of said State Board of Equalization, and that at no time since June 30, 1935, or at any other time, has the plaintiff failed to comply with any provision of the Retail Sales Tax Act, or any rules and regulations of the State Board of Equalization, prescribed or adopted under such Act" [Rec. p. 8];

(f) That the amount claimed is $6,572.28, and there has been an overpayment of $27,963.46;

4. In the event the plaintiff's permit is revoked "plaintiff would not be entitled to any existing provisions of the law of the State of California to recover said sums of money, or any interest thereon. That by reason of each and all of the facts herein alleged, plaintiff has no plain, speedy or adequate remedy at law." [Rec. p. 8.]

1. The California Retail Sales Tax Act of 1933 (Statutes of 1933, p. 2599; Deering's Gen. Laws, Act 8394) was designed to raise funds for the operation of the State of California, and levied a tax of 2½% "for the privilege of selling tangible personal property at retail." The tax was and is imposed upon "retailers" at the rate of 2½% of the gross receipts of such retailer from the sale of "tangible personal property sold at retail in this state." The original statute was in effect until June 30, 1935, when the amendment of 1935 (Statutes of 1935, p. 1252) went into effect. This 1935 amendment is also known as Chapter 355 of the Statutes of 1935. By Section 1, it amended the title. By Section 2, it amended Section 5 of the original Act, stating in part:

> "Sec. 5. There is hereby specifically exempted from the provisions of this Act and from the computation of the amount of tax levied, assessed or payable under this Act, the following: * * * (e) The gross receipts from the sale of food products for human consumption. 'Food products' as used here included cereals and cereal products, milk and milk products * * * eggs and egg products * * *, fruit and fruit products * * * cocoa and cocoa products, other than candy and confectionery. * * *"

It is admitted that the products for which the State Board of Equalization proposed to tax Helms Bakeries were sold prior to the time the change in the law went into effect, and were food products within the 1935 exemption [Rec. p. 17]. The amending statute, Chapter 355 of the Statutes of 1935, contained no "saving" clause. Under the unchallenged findings of this case, at the time of the proposed forfeiture, HELMS BAKERIES, which sought and

received the injunction against forfeiture of its sales tax permit, had overpaid through error and mistake on foodstuffs, $27,963.46 [Rec. p. 5], and the State was trying to collect from it $6,572.28 [Rec. pp. 6-7]. The proceeding was in equity. Under the findings which are not overthrown, there was no sales tax due under any theory, however, assuming for the purpose of answering the apparent position of the State Board of Equalization and the incorrect assumption of the District Court of Appeal, that there was a tax unpaid for the period from October 1, 1934, to the effective date of the repeal of the statute, June 30, 1935, and disregarding the right to offset, any right to collect the same was lost. This is evidenced from the wording of the amending statute which says, in part:

> "* * * there are hereby specifically exempted from the provisions of this Act (and the Act includes the sections with respect to forfeiture of a permit, suit for collection, etc.) and from the computation of the amount of tax levied, assessed or *payable* (italics ours), under this Act * * * the gross receipts from the sale of food products. * * *"

The first step of the State Board of Equalization in attempting "the computation of the amount of tax levied, assessed or payable under this Act on * * * food products" was in 1938 [Rec. p. 4]. There was therefore no statutory authorization. There was assumption of authority not granted by statute to the State Board of Equalization. Such an arbitrary act is a violation of constitutional rights under the Fourteenth Amendment to the United States Constitution.

*Home Tel. & Tel. Co. v. City of L. A.*, 227 U. S. 278, 57 L. Ed. 510.

Where a taxing statute is repealed without a "saving" clause to permit any subsequent collection, no action for collection will lie. Also, any attempt to collect such a tax by indirection is a violation of the constitutional rights of the person against whom the attempt is being made. An attempted forfeiture might be considered as an attempt to collect as the District Court of Appeal of the State of California assumes that it is, or might be merely spite-work. In either event, the Board or other governmental officer seeking to proceed in this manner is without power to do so.

*U. S. v. Ship Helen,* 6 Cranch. 203, 3 Law. Ed. 199;

*Mason v. Sargent,* 104 U. S. 689, 26 Law. Ed. 894.

The general rule is recognized in 59 C. J., commencing at page 1189 (Stats., Par. 727):

> "As a general rule, the repeal of a statute without any reservation takes away all remedies given by the repealed statute and defeats all actions and proceedings pending under it at the time of the repeal. The rule is especially applicable to the repeal of statutes creating a cause of action, providing a remedy not known to the common law or conferring jurisdiction where it did not exist before, and abates proceedings pending, even after judgment before the entry thereof, or pending on appeal."

2. Under the California Retail Sales Tax Act it is provided in Section 3 that "such tax shall be paid at the time and in the manner hereinafter provided * * *"; also, in subdivision 9, "the tax levied hereunder shall be a direct obligation of the retailer and shall be due and payable quarterly on or before the 15th day of the month

next succeeding each quarterly period * * *." Assuming, therefore, that we are incorrect in subdivision 1 of this argument (that the right to any tax on foodstuffs as sold by the routemen was abolished in 1935), and assuming that HELMS BAKERIES was the retailer and not the wholesaler who sold the edibles to the routemen who sold them to the public, the tax on the sales which are supposed to have been taxable was due as follows:

For the quarter commencing October 1, 1934, and ending December 31, 1934, on January 15, 1935;

For the quarter commencing January 1, 1935, and ending March 31, 1935, on April 15, 1935;

For the quarter commencing April 1, 1935, and ending June 30, 1935, on July 15, 1935.

Section 26 of the Retail Sales Act, as amended in 1935, provides in part:

> "At any times within three years after any retailer is delinquent in the payment of the tax herein provided for, the Board may proceed forthwith to collect the tax due from the retailer in the following manner: (Seizure and sale.)"

Section 30 of the same Act, as amended in 1935, provides in part:

> "At any time within three years after the delinquency of any tax, the Board may bring an action in a court of competent jurisdiction in the name of the People of the State of California to collect the amount delinquent, together with penalties * * *."

Prior to July 1, 1935, the period was two years. The statutory period passed prior to the attempted or threatened forfeiture.

Section 16 of the original Act has not been amended and provides:

> "Whenever the holder of a permit fails to comply with any of the provisions of this Act or any rules and regulations of the Board prescribed and adopted under this Act, the Board upon hearing after ten days' notice in writing of the time and place of the hearing to show cause why his permit should not be revoked, may revoke or suspend the permit."

Where a specific method has been set up in a statute with respect to the duties of a Board under that Act, that specific method governs and must be followed rather than a resort to a general procedure.

*Southerland on Statutory Construction* (2d Ed.) §348;

*Townsend v. Little,* 109 U. S. 504, 512, 27 L. Ed. 1012;

*Pillsbury Flour Mills Co. v. Great Northern Railway Co.*, 25 Fed. (2d) 66, 68-69.

In this case, there has been no adjudication or determination that "* * * The holder of a permit fails to comply with any of the provisions of this Act." The Bakery not only has a right to a hearing in Court, but such a finding must be made and become final before the revocation or suspension of the permit may take place.

*Laisne v. Cal. State Board of Optometry* (March, 1942), 19 Cal. (2d) 831.

The section with respect to revocation or suspension of permits (Section 17) is not applicable until there has been a judicial determination and that there has been a failure

to comply. The section does not state "Whenever the holder of a permit HAS IN THE OPINION OF THE BOARD OF EQUALIZATION failed to comply." It does state "Whenever the holder of a permit fails to comply * * *." An examination of the statute indicates that the judicial power to determine any failure is absent from any statutory grant to the State Board of Equalization. Its assumption of legal right to act as a court and determine such a question of fact is arbitrary and a violation of the petitioner's constitutional rights.

*Laisne v. Cal. State Board of Optometry, supra.*

In 12 C. J. 845-6 (Const. Law, §329) the text writer says:

> "The power conferred to make regulations for carrying a statute into effect must be exercised within the powers delegated, that is to say, must be confined to details for regulating the mode of proceeding to carry into effect the law as it has been enacted, and it cannot be extended to amending or adding to the requirements of the statute itself; but it is to be presumed that regulations adopted were to carry out only the provisions of the statute and not to embrace matters not covered, nor intended to be covered, thereby."

Assuming, but not agreeing, that the three-year statute of limitations with respect to actions to collect is not applicable to forfeiture of a permit, even though the purpose of the forfeiture is to collect tax due, then the general California statute of limitations with respect to actions applies. Up to November 24, 1942, no such action has yet been filed. The proposed forfeiture proceedings before the State Board of Equalization were presumably

commenced by the State Board of Equalization in giving a notice in writing to the plaintiff to appear and show cause why its Permit AX-1887 should not be revoked. This was found by the Court to be "on or about May 20, 1940" [Rec. p. 6]. This was four years and ten months from the date the last payment should have been made under the State Board of Equalization's contentions. The statute of limitations in the State of California is set forth in its Code of Civil Procedure. Section 312 of the Code states:

> "Civil actions, without exception, can only be commenced within the period prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

The title referred to is Title 2 of the Code which is headed "Time of Commencing Civil Actions." An examination of the subject matter of the title involved indicates that the applicable section is C. C. P. 340, which provides in part as follows:

> "Within one year:
>
> "1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the State, except where a statute imposes and prescribes a different limitation;
>
> "2. An action on a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the people of this State. * * *"

It will be seen, therefore, that the time in which to forfeit has lapsed, either under the statute or under general law.

It is well settled law, both in the State of California and throughout the United States of America, that the Board

of Equalization has only such authority as is given to it under the statute and that forfeitures are not looked upon with favor and must be strictly construed.

*Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 43 Fed. 341.

The California law on forfeitures is well set out in 23 Cal. Jur. 804 (Statutes 180), reading as follows:

> "The law abhors forfeitures, and statutes are construed strictly against them, or as liberally as possible to prevent them. An act will always be construed against a forfeiture if the language is fairly susceptible of such an interpretation. And a statute declaring a forfeiture will not be extended beyond its direct meaning by implication, unless such implication is imperative by reason of the subject matter or terms employed."

3. We have set forth a number of findings which have not been overturned by the District Court of Appeal in its opinion. In order to disregard them, the District Court of Appeal would have to overthrow them and find that the lower court was not warranted in so holding. Inasmuch as this has not been done and these findings are in effect, obviously the decision of the District Court of Appeal deprives the petitioner of its rights without due or any process of law.

The District Court disregarded the findings, acting upon the erroneous theory that an injunction would not lie in favor of a corporation against the arbitrary acts of a board, or an unconstitutional statute. It erred in so holding [Rec. p. 80].

*Pierce as Governor v. Society of Jesus etc.*, 268 U. S. 510, 69 L. Ed. 1071.

4. The District Court of Appeal takes the position that a deposit of the money claimed with the state treasurer and an action to recover it, would have been a proper remedy, and that HELMS BAKERIES by following this remedy would have a right to recover its money back and, therefore, not suffer great and irreparable injury. This position assumes that the State Board of Equalization would not forfeit that sales tax permit, or it is not necessary to the operation of the business of HELMS BAKERIES, and there are other hurdles which are not specifically discussed in the decision; it assumes also that this statute or other statutes provide a method for the recovery of such money. Section 31 of the Retail Sales Tax Act provides, in part:

> "No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this Act the collection of a tax sought to be collected; but after payment of any such tax under protest, duly verified and setting up the grounds of objection to the legality of such tax, the retailer paying such tax may bring an action against the State Treasurer in a court of competent jurisdiction in the County of Sacramento for the recovery of the tax so paid under protest. *No action may be instituted more than 60 days after the tax becomes due and payable.*" (Italics ours.)

There is no tax on foodstuffs under the statute, so why deposit the money not owed when one cannot sue to get it back because the time has lapsed? No claim of the Board against the Bakery was made until years after the 60-day period.

The prohibition of Section 31 of the statute is against an injunction to prevent or enjoin the collection of a tax

sought to be collected. The forfeiture of the sales tax permit is not an action to collect the "tax sought to be collected," but a penalty which would theoretically deprive the Bakery from making any further sales under the terms of the Act. The notice sent to the Bakery [Rec. p. 6] does not require it to show cause why the permit should not be revoked until and unless it pays the tax, nor does the section on revocation have any such provision. The term "the collection of any tax sought to be collected" used in Section 31 with respect to injunction relief obviously refers back to the previous section, Section 30, which provides that "At any time within three years after the delinquency of any tax, the Board may bring an action in a court of competent jurisdiction * * * to collect the amount delinquent, together with penalties." The State Board of Equalization had let the three years go by under this section and the one-year general penalty statute of limitations go by under the penalty section with respect to forfeiture of a sales tax permit. Hence, as held by the trial court, there can be no collection of the tax, and, obviously, the forfeiture of the permit would not be, was not, and could not be a method of collection. All that it would be would be "pressure." An injunction will lie in such cases and regardless of the statute does lie under such circumstances.

The rule is well set forth in 59 C. J. 1078 (Statute, §634), as follows:

> "A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, and made with a view to the proper, orderly, and prompt conduct of business, is usually directory, unless the phraseology of the

statute, or the nature of the act to be performed and the consequences of doing or failing to do it at such time, is such that the designation of time must be considered a limitation on the power of the officer."

A trial court of competent jurisdiction has found there is no liability, the state is indebted to the petitioner in far more than the amount claimed, and the statute itself gives no remedy by way of deposit in court or elsewhere. The observations of the District Court of Appeal with respect to Section 31, are beside the point and assume a state of facts not in accord with the evidence or findings. This remedy is not open to the petitioner and no recovery could be had.

**The Proposed Forfeiture Is an Abuse of Process, and May and Should Be Enjoined.**

*Higgins v. Calif. Prune etc.*, 282 Fed. 550, 557-8.

This proposition is decided law in California under *Hugson, etc. v. State Bd. of Eq. of Cal.*, 23 Cal. App. (2d) 281, 3, holding "A number of authorities are cited in support of the proposition that such a provision of law (forfeiture for non-payment) is valid, and that no injunction to restrain the collection of the tax should issue, but that the person paying the tax is afforded a speedy and adequate remedy at law by paying the tax under protest and thereafter instituting proceedings for the recovery of the same." *That this position of the appellants is untenable readily appears from the fact that this action is not one to restrain the collection of a tax.* It is simply a proceeding having for its purpose the restraining of certain officers from canceling truck registration certificates, and thereby barring the plaintiff's trucks from the highway!

## POINT B.

**Forfeiture of the Permit Would Be Improper Because a Method of Collection of Delinquent Taxes Is Provided by the Statute and the Specific Provisions of the Statute Govern the General Provisions.**

Where a method of collection is specifically provided by statute, even though it uses the word "may" instead of the word "must" that method is the one that must be followed. It takes precedence over any general plan, and particularly over any general penal plan not denominated as a collection method, and not containing a definite indication that it is usable for collection purposes, and which method may not result in a collection. This rule of construction is particularly true where the penal clause was passed prior to the collection clause as it now stands (the penal clause has not been amended since the original statute was passed in 1933; the collection clause was amended in 1935 changing the period of limitations on the bringing of such an action from two years to three years).

*The Mayor of Galena v. The U. S.*, 72 U. S. 705, 18 L. ed. 560;

*The Board of Supervisors v. The U. S.*, 71 U. S. 435, 18 L. ed. 419;

*Uhl v. Bardaracco as Supervisors, etc.*, 199 Cal. 270, 282.

It is the general rule, not only in California but throughout the nation, that a statute or portion of a statute dealing with common subject matter in a minute way will always prevail over a general statute or a portion of a general statute dealing with the same subject matter in a general way.

*Jackson v. Cravens* (Circuit Court of Appeals, 5th Circuit), 238 Fed. 117;

*Ahern v. Livermore Union High School District,* 208 Cal. 770.

Furthermore, the statute in this case, which provides for collection, is upheld by the doctrine that where simillar terms are used in two parts of a statute they are construed as used together.

*U. S. v. Baumgartner,* 259 Fed. 722;

*Puget Sound Electric Railroad, et al. v. Benson,* 253 Fed. 710.

## POINT C.

**The Section Concerning Forfeiture Does Not Provide for Review by the Courts, Nor Does the Constitution Give a Board of Equalization Judicial Powers. No Review Being Possible, the Section Is Unconstitutional and Deprives the Petitioner of Property Without Due Process of Law.**

We have mentioned that Section 16 of the Retail Sales Tax Act concerning revocation or suspension of a permit states: "Whenever the holder of a permit fails to comply with any of the provisions of this Act, or any rules and regulations of the Board prescribed and adopted under this Act, the Board upon hearing, after giving ten days notice in writing of the time and place of the hearing to show cause why his permit should not be revoked, may revoke or suspend the permit." We have mentioned that this section does not empower the State Board of Equalization to determine that there is an indebtedness until it has been adjudicated by competent authority. Thus, in this case, it had been pleaded [Rec. p. 17] that there is no legal basis for the forfeiture, and the trial court so held. The evidence and the pleadings do not disclose any Court determination of the indebtedness, and this is a prerequisite. Assuming, however, that we are incorrect in this interpretation, and that the law does provide that the State Board of Equalization may act as a trial court and take evidence, and then revoke a permit, the statute is not constitutional. We find no constitutional provisions in the Constitution of the

State of California granting such judicial power to the State Board of Equalization, and such a power would have to be granted by the Constitution and not by a statute of the legislature. This constitutional question has been recently considered by our Supreme Court in the case of *Laisne v. California State Board of Optometry, et al.* (March 16th, 1942), 19 Cal. (2d) 831. The proceeding was one for a writ of mandate to set aside an order of the State Board of Optometry revoking applicant's certificate of registration to practice optometry in California. The Board of Optometry revoking appellant's license, after a hearing as provided in Sections 3090-3091 of the Business and Professions Code. The complaint before the Board alleged violation by the applicant, an optometrist of sections of the Business and Professions Code. The Board of Optometry took evidence and determined on the evidence that the applicant had violated the provisions of the statute. The California Court says, in part (commencing on page 834—marked 2):

> "The powers of the government of the state are divided into three separate departments—the legislative, executive and judicial. (Article III, section 1, of the state Constitution.) State-wide judicial power may be exercised by only three *enumerated* courts, viz., the Supreme Court, the District Courts of Appeal, and the superior courts. (Article VI, section 1, of the state Constitution.) No other body can exercise state-wide judicial power except as the result of con-

stitutional amendment. (Pacific Coast Casualty Company v. Pillsbury, 171 Cal. 319 [153 Pac. 24]; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407 [156 Pac. 491, Ann. Cas. 1917E, 390].) If, therefore, some agency with state-wide jurisdiction, other than one of the enumerated courts, without sanction by constitutional amendment, exercises or attempts to exercise judicial power, such action is in direct violation of the articles of the state Constitution cited above.

It is true that there can be no complete separation of powers of government in an ever changing social order. It is equally true that each department for its own existence must in some degree exercise some of the functions of the others. That there can be no rigid line over which one department cannot traverse has been recognized since the first test of the doctrine of separation of powers. There still remains, however, this unalterable fact: When one department or an agency thereof exercises the complete power that has been by the Constitution expressly limited to another, then such action violates the implied mandate of the Constitution. If, in the instant case, the superior court in the mandate proceedings were limited to the evidence presented before the board, or if the findings of fact by the board were conclusive on the court, then the board would be exercising the complete judicial power reserved to the enumerated courts. The appellant's right to practice optometry was a vested property right. (Hewitt v.

State Board of Medical Examiners, 148 Cal. 590 [84 Pac. 39, 113 Am. St. Rep. 315, 7 Ann. Cas. 750, 3 L. R. A. (N.S.), 896; Suckow v. Alderson, 182 Cal. 247 [187 Pac. 965].) In the proceeding against him by the board all the rights of 'procedural' due process were accorded him, viz., notice, right to appear and answer the charges made against him. Witnesses were subpoenaed and evidence was taken. A reporter was present and a record made of the whole proceedings. At the conclusion of the hearing an order was made revoking appellant's license to practice. This then would be an exercise of the complete judicial power that was contemplated by the framers of the Constitution, and appellant would be deprived of his constitutional right unless he had a right to go into a court of law and question the validity of that order by the introduction of any material evidence to prove that he did not commit the acts alleged."

*Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287; 64 L. Ed. 908.

## POINT D.

**The Threatened Forfeiture of a Permit Is Not a Constitutional Method of Procedure to Collect an Alleged Civil Debt, and Such a Method or Procedure Legalizes Government by Force and Threat, and Is a Violation of the Petitioner's Constitutional Rights.**

We have heretofore cited the case of *Fidelity & Deposit Co. v. Tafoya.* It illustrates one of the threats of the day against which the courts and citizens must guard. Government by pressure and threats is un-American and unconstitutional. Mr. Justice Holmes recognized this danger many years ago in the *Tafoya* case where the chairman and members of the State Corporation Commission of the State of New Mexico proposed to exclude the Fidelity & Deposit Company from their state, *i. e.,* to deny the right to certificate to do business in the state, because of alleged violations of the New Mexico law. Justice Holmes stated (270 U. S. 434, 70 L. Ed. 667):

> "Coming then to the merits we assume in favor of the defendants that the state has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result."

The forbidden result has here been accomplished. *Home Tel. etc. v. City of Los Angeles, supra.*

For any court to say substantially "Executive or Administrative State officials need not resort to the court but may by fiat destroy legitimate business without resort to court procedure to determine whether or not the corporation has been adjudged to have committed any offense," is to completely undermine our American system of government, which has three branches, executive, legislative and judicial.

## Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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